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No. 91-162

In The

Supreme Court of the United States

October Term, 1991

JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING and JEANETTE JUSTICE, as Individuals,

Petitioners,

vs.

ROSEMARY SOONG and JAMES SOONG,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONERS' REPLY MEMORANDUM

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONERS' REPLY MEMORANDUM

I. ARGUMENT

A. The Hawaii Supreme Court's Decision Rejecting Qualified Immunity for Petitioners is an Appealable "Final Judgment" within this Court's Jurisdiction.

Respondents are plainly wrong in their contention that jurisdiction does not lie in this Court to review the State courts' denial of Petitioners' claim of qualified immunity. All of respondents' general discussion about "finality" and various formulations of it are simply of no

consequence in light of this Court's specific recognition of the finality of denials of claims of qualified immunity in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). *Mitchell* makes clear that denials of claims of qualified immunity are appealable "final judgments" under the "collateral order" rule. *See* 472 U.S. at 524-30; *see also Siegert v. Gilley*, 111 S. Ct. 1789, 1793-94 (1991).

Respondents' only ground for avoiding *Mitchell*'s applicability is the fact that the Hawaii Supreme Court, in rejecting Petitioners' claim of qualified immunity, remanded to the state trial court with the instruction that it consider whether respondent Soong had exhausted all her administrative remedies. Respondents claim this instruction defeats the finality of the rejection of qualified immunity because the case may never get to trial (were the trial court to dismiss the case on the exhaustion matter). This claim is wrong. Both *Mitchell* and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), upon which *Mitchell* is based, make clear that immunity relieves government officials not only of actual damage liability and the burdens of *trial*, but also the burden of *pretrial* matters, including discovery, that can be equally "disruptive of effective government." *See Mitchell*, 472 U.S. at 526.

The Hawaii Supreme Court's remand will force petitioners to bear the burden of litigating the exhaustion issue and subject them to discovery on that and potentially other issues. It is precisely such burdens that qualified immunity was designed to avoid. Indeed, in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), this Court confirmed that " 'discovery should not be allowed' " on *any* issue until the " 'threshold immunity question' " is resolved. *Id.* at

1793 (quoting *Harlow*). It is irrelevant to *Mitchell* appealability that, after further proceedings, the case against defendants might be mooted, for it is the very process of determining those issues that immediately infringes the rights conferred by qualified immunity.[1]

B. Review Should Be Granted to Correct the Hawaii Courts' Obvious Misapprehension of Qualified Immunity Precepts.

Petitioners' primary contention is that there is no clearly established *substantive* due process right to continued enrollment free from arbitrary dismissal, and thus petitioners (having been sued only for damages under § 1983) should be dismissed from the suit under qualified immunity. *See* Pet. at 12-23. Respondents' brief never even deals with this claim and proves precisely why the writ of certiorari should issue here.

Respondents' consistent response to the Petition's claim that there is no clearly established *substantive* due process right of review of academic decisionmaking is to seek to bury the Petitioners in the asserted "*factual* basis" of the decision of the Supreme Court of Hawaii. *See* Resp.

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[1] Jurisdiction is also proper under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 481-82 (1975), under the rule allowing jurisdiction here where, "if [petitioners] were to lose on the merits [below], however, the governing state law would not permit him again to present his federal claims for review." Here there is no guarantee that the trial court would again grant an interlocutory appeal under § 641-1(b), Haw. Rev. Stat., or that state appellate courts would entertain an appeal under Hawaii's own version of the collateral order doctrine. Respondents do not have any answer to this basis for review.

Br. at 14. Thus, Respondents rely on the claim "that there was a genuine issue as to whether Petitioners terminated Rosemary for a non-academic reason that did not reflect professional judgment," terming the decision below as a "factual determination." *Id.* at 17.

The notion, however, that the lower courts' "factual determination" is Petitioners' "main complaint" (Resp. Br. at 17) could not be more wrong, for, even if, *in fact*, Petitioners *did* terminate Rosemary for non-academic reasons, that would *not* be determinative of Petitioners' qualified immunity claim.

First, as this Court held in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Id.* at 1793. Contrary to the position taken by respondents, this Court in *Regents v. Ewing*, 474 U.S. 214 (1985), expressly *reserved* the issue whether claims of "arbitrary and capricious" dismissal (there from medical school) state "a violation of a constitutional right at all." Respondents fundamentally ignore the structure, and express language, of *Ewing*, in asserting that *Ewing* established a right to federal "judicial review of her academic dismissal under the framework of a substantive due process protection." *See* Resp. Br. at 14. Indeed, Respondents make the absurd argument that, because *Ewing* "refused" to "explicitly reject the constitutional claim asserted by Respondents," Resp. Br. at 21, Petitioners' actions violated clearly established law.

This reading of precedent turns this Court's judgments on their head. Accepting it would flout the *Ewing* majority's considered postponement whether there was "a constitutional right at all" to substantive due process, and numerous other decisions of this Court postponing important federal issues.

This Court's determination to abstain from deciding difficult federal questions at the least ought to carry with it the message that the issues being postponed are not "clearly established," and, on this front, Respondents simply have no answer to the claim (*see* Pet. at 13-18) that the Supreme Court of Hawaii simply did not follow "a precedent of this Court." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

Second, Respondents do not even respond to the numerous decisions in the federal courts of appeals that conflict with the judgment below, and which counsel review and reversal on the basis of their holdings that the substantive due process right at issue here may not (or does not) exist. *See, e.g., Mauriello v. University of Medicine and Dentistry of New Jersey*, 781 F.2d 46, 52 (3d Cir. 1986); *Crook v. Baker*, 813 F.2d 88, 100 & n.7 (6th Cir. 1987); *Akins v. Board of Governors of State Colleges and Univs.*, 840 F.2d 1371, 1376 (7th Cir. 1988); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986); *Haberle v. University of Alabama in Birmingham*, 803 F.2d 1536, 1539 n.1 (11th Cir. 1986). *See also Lum v. Jensen*, 876 F.2d 1385, 1389-90 (9th Cir. 1989) (public employment context). Respondents' default in the face of this precedent is an added factor that warrants granting the writ of certiorari here.

Third, even if the foregoing did not counsel review, Respondents have failed to overcome the reasons for granting review on the Petition's alternative theory (Pet. at 23-25) that, on Respondents' own reading of the record, the Supreme Court of Hawaii's judgment still cannot stand, for "whether Defendants actually followed university guidelines on dismissal and whether Soong's dismissal was a substantial departure from accepted academic norms" (Pet. App. at 4a) does *not* signify that Petitioners were " 'plainly incompetent' " or " 'knowingly violate[d] the law.' " *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991). The issue, for qualified immunity purposes, is whether it would be "objectively legally reasonable" to believe that "accepted academic norm[s]" were followed, whether they were or not in fact. *Anderson v. Creighton*, 483 U.S. 635, 644 (1987). Respondents have no answer to this, and the writ should thus issue.

Fourth, Respondents spend much time trying to prove that there is clearly established *state* contract law protection for continued enrollment, *see* Resp. Br. at 14-15, 18, that rises to the level of a "property interest" protected by due process. But this contention, at most, is related only to a claim for deprivation of *procedural* due process, not *substantive* due process. *See Ewing*, 474 U.S. at 223 (majority choosing to assume, rather than to decide, the existence of a *substantive* due process right); 474 U.S. at 229 (Powell, J., concurring) (arguing, without refutation by the majority, that substantive due process rights are created only by the Constitution, and not by state law). Respondents, in their federal claim below, did not raise a procedural due process claim (*see* Pet. App. at 35a), and the Supreme Court of Hawaii did not treat

Respondents' federal cause of action as seeking procedural relief (*see* Pet. App. at 3a-4a). On this sort of record, this Court will "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Medical Center*, 485 U.S. 80, 86 (1988).[2]

Fifth, Respondents' ultimate argument consists of urging the Court, as a matter of policy, to jettison the immunity rule. Thus, Respondents claim that "[t]o accept Petitioners' reasoning is to always grant immunity to school officials who are accused and are proved to have terminated a student in bad faith or for a non-academic reason," and, indeed, "[t]he school official could well admit that he/she in fact terminated a student for an impermissible non-academic reason and still be protected by qualified immunity." Resp. Br. at 19. This assertion is

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[2] The only case support cited in opposition with respect to the merits of Petitioners' immunity defense other than *Ewing* (which is mis-cited), are decisions of this Court dealing solely with procedural due process matters, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), and *Kekoa v. Supreme Court*, 55 Haw. 104, 516 P.2d 1239 (1973), also a procedural due process case. *See* Resp. Br. at 14, 15, 18. There is no indication in the record below that Respondents ever advanced a procedural due process theory in the Hawaii courts.

Even if Respondents had relied upon a procedural due process theory, the writ should nonetheless still be granted as the judgment below provides authorization for a recovery that exceeds the scope of procedural due process protection. *See Carey v. Piphus*, 435 U.S. 247, 264-65 (1978), quoted in *Memphis Community School District v. Stachura*, 477 U.S. 299, 309 (1986).

simply wrong. Not only does it beg the question "whether the plaintiff has asserted a violation of a constitutional right at all," *see Siegert*, 111 S. Ct. at 1793, it far overstates the situation. The issue of immunity for Respondents' federal cause of action has no bearing upon potential state law claims. Nor does immunity bear, necessarily, upon a claim for federal equitable relief, the principal means for assuring compliance with the supreme law. *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986). All that is being asked of this Court here is enforcement of the "protective" doctrine of qualified immunity, *see Burns v. Reed*, 111 S. Ct. at 1944, which protects public litigants who have, at worst, "gambled and lost" on the "resolution of . . . open question[s]" of federal constitutional law from the potentially crushing burdens of litigation under 42 U.S.C. § 1983. *See Mitchell*, 472 U.S. at 535. Accordingly, review is warranted.

C. At the Very Least, this Court Should Vacate And Remand for Further Consideration in Light of the Clarification of Immunity Precepts in *Siegert v. Gilley* and *Burns v. Reed*.

Although this Court, in its recent decisions in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), and *Burns v. Reed*, 111 S. Ct. 1934 (1991), significantly clarified the role of qualified immunity in personal damage suits under 42 U.S.C. § 1983, Respondents urge that not even a remand is in order to allow the Supreme Court of Hawaii to evaluate, in the first instance, the impact of these recent decisions. Respondents here are wrong.

At a very minimum, the Supreme Court of Hawaii postponed the immunity inquiry until after other issues, which the court below perceived as more important, were resolved. *Siegert* makes absolutely clear that this approach is error. Just as the District of Columbia circuit erred in "[a]ssuming without deciding" the immunity questions in *Siegert*, here the Hawaii courts committed obvious error in failing to first resolve the "purely legal question[s]" pertaining to Petitioners' immunity. *See Siegert*, 111 S. Ct. at 1793. At least, this case should be remanded for further consideration in light of *Siegert*, even if this Court is "not certain that the case [is] free from all obstacles to reversal on an intervening precedent." *Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964) (per curiam).

Likewise, the Supreme Court of Hawaii, before being permitted to commit Petitioners to an extensive round of trial level (and further appellate) litigation, should be required to give further consideration to Respondents' federal claim in light of *Burns v. Reed*, 111 S. Ct. 1934 (1991), where this Court greatly clarified the "protective" nature of qualified immunity from § 1983 damages actions. *See id.* at 1944 and n.8 (noting, for the first time, that qualified immunity, as " 'completely reformulated' " by this Court "satisifies one of the principal concerns underlying our recognition of absolute immunity"). It is elementary that "a precedent of this Court must be followed by the lower federal [and state] courts." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). At a minimum, vindication of this principle requires granting the writ, and vacating and remanding for further consideration in light of *Siegert* and *Burns*, whose guidance the

Supreme Court of Hawaii lacked at the time it decided Petitioners' recent appeal.

II. CONCLUSION

For the reasons above and in the Petition, this Court should grant the writ and ultimately reverse the judgment of the Hawaii Supreme Court with respect to Respondents' claims against Petitioners. Alternatively, this Court should grant the Petition, vacate the judgment as to the claims against Petitioners, and remand for further consideration in light of *Siegert v. Gilley*, 111 S. Ct. 1789 (U.S. May 23, 1991), and *Burns v. Reed*, 111 S. Ct. 1934 (U.S. May 30, 1991).

Dated: Honolulu, Hawaii, September 18, 1991.

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